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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-321

DREWRYS LIMITED U. S. A., INC. AND LOCAL UNION NO. 275, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

ANN BARTMESS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JAMES W. OBERFELL,
CRUMPACKER, MAY, LEVY & SEARER,
224 West Jefferson Boulevard,
South Bend, Indiana 46601,
Attorney for Petitioner, Local Union No. 275, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO,

WARREN E. McGILL,
THORNBURG, McGILL, DEAHL, HARMAN, CAREY & MURRAY,
645 First Bank Building,
South Bend, Indiana 46601,
Attorney for Petitioner, Drewrys Limited U. S. A., Inc.

Of Counsel:

WARREN A. DEAHL,
FREDERICK F. THORNBURG,
THORNBURG, McGILL, DEAHL, HARMAN, CAREY & MURRAY,
645 First Bank Building,
South Bend, Indiana 46601.

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Petitioners,

vs.

ANN BARTMESS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on July 7, 1971.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is not yet reported in the official reports but is printed in Appendix A hereto, *infra*. The opinion of the Court of Appeals reversed an order of the District Court for the Northern District of Indiana, South Bend Division which dismissed Respondent's complaint for lack of subject matter jurisdiction. The order of the district court, dismissing Respondent's complaint is not officially reported; the material part of the order as reflected by the record is printed in Appendix A hereto, *infra*.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 7, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTES AND FEDERAL GUIDELINE.

The statutes involved are: Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e et seq., the relevant provisions being Sections 2000e-2(a) and (c), 2000e-5(a), (d) and (e) and 2000e-12(b); the Administrative Procedure Act, 5 U. S. C. § 706(2)(a). Because these provisions are lengthy, their pertinent text is set forth as Appendix B hereto, *infra*.

The federal guideline involved is the Equal Employment Opportunity Commission's (hereinafter referred to as EEOC) *Guidelines on Discrimination Because of Sex*, Section 1604.31(a) and (b), as amended February 21, 1968, 29 C. F. R. § 1604.31(a) and (b). The material text of Guideline is printed in Appendix C hereto, *infra*.

QUESTIONS PRESENTED.

The questions presented herein arise under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e et seq., and raise vitally important issues anent district court jurisdiction over Title VII actions and the application of Title VII to private retirement plans.

They represent questions which have not been settled by this Court and whose resolution will have a far reaching financial impact upon not only the instant Petitioners but upon all other companies and unions which have negotiated

retirement plans that differentiate between men and women with respect to retirement age.

The questions presented are:

1. Whether the decision of the Court below is in conflict with the jurisdictional filing prerequisite of Section 706(d) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(d), which provides that "a charge * * * shall be filed [with the EEOC] within ninety days *after* the alleged unlawful employment practice occurred * * *." (Emphasis added.) The district court found it was without jurisdiction over the Respondent's suit because she had failed to timely file a written charge with the EEOC as is required by Section 706(d) of Title VII; the Respondent filed her charge more than four months before the occurrence of the alleged isolated unlawful employment practice complained of in the district court, *i.e.*, her compulsory retirement at age sixty-two. The Court below reversed the district court and held that the Respondent had timely invoked the administrative process of the Civil Rights Act, as required by Section 706(d).

2. Whether the unlawful employment practice alleged in Respondent's charge with the EEOC is in fatal variance with the allegations contained in Respondent's complaint. The district court found a fatal variance existed between the charge and the complaint and accordingly determined it was without jurisdiction to hear Respondent's complaint. The Court below reversed the district court, finding no such variance to be present.

3. Whether the Respondent is an "aggrieved person" within the meaning of Section 706(a) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(a), raises two paramount questions:

(a) should the Respondent be estopped or heard to contest the legality of her retirement since her retirement was

effected pursuant to a collective bargaining agreement which she, through her own duly elected bargaining agent, the Petitioner Union, negotiated prior to the enactment of Title VII; and

(b) should the Respondent be deemed to have waived any rights to claim a loss as a result of the plan from which she derived and accepted benefits?

The decision of the Court below fails to treat and dispose of either of these two important questions; this oversight is surprising in view of the fact that the Court below posed questions bearing upon the issue of whether the Respondent should be heard to complain about an agreement which her own elected bargaining agent negotiated prior to the enactment of Title VII.

4. Whether it can be concluded that Congress intended Title VII to prohibit sex differentials in retirement plans notwithstanding the available legislative history and the statements of Senator Hubert Humphrey, Floor Manager of the Civil Rights Bill of 1964, that Title VII was not intended to impair existing retirement programs. The Court below answered the question affirmatively.

5. Is the Equal Employment Opportunity Commission's *Guideline on Discrimination Because of Sex*, as amended February 21, 1968, 29 C. F. R. 1604.31, arbitrary and capricious and should it have been given retroactive application as to some firms, unions and employees and not others? In addition to the serious question of selective and discriminatory retroactive application of the Guideline, there is an equally important question as to whether the Guideline should be applied retroactively or prospectively. The Court below held that the Guideline was not capricious notwithstanding its built-in grace period which had the effect of temporarily insulating certain companies and unions from charges alleging sex discrimination in their retirement

plans; the grace period necessarily afforded these select companies and unions an opportunity to adjust their retirement plans so as to comply with the Guideline's pronouncement that Title VII was intended to prohibit sex differentials in retirement plans. The Court below completely ignored the critical question of whether the Guideline should be given retroactive effect.

STATEMENT OF THE CASE.

The apposite facts and relevant proceedings in this case are not disputed and may be summarized in the following manner.

The Respondent was a former non-supervisory employee of the Petitioner Drewrys Limited U. S. A., Inc. and was a member of Petitioner Local Union No. 275, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO.

During all periods of time relevant to this application, the Petitioner Union was the exclusive bargaining agent for the Respondent. Pursuant to a collective bargaining agreement negotiated by the Petitioners, a retirement plan was adopted and became effective on May 1, 1955 wherein it was agreed that female employees of the Petitioner Company were to retire at age sixty-two and male employees were to retire at age sixty-five. Like all other similarly situated employees and union members, Respondent was subject to the terms and conditions of the retirement program.

On February 16, 1967, approximately four and one-half months before Respondent's retirement, she filed an administrative charge with the EEOC; in essence, the charge alleged that the Petitioners were committing an unlawful employment practice in violation of Title VII of the Civil

Rights Act of 1964 by maintaining a retirement program which discriminated against her because of her sex.[1] On June 30, 1967, Respondent passed her sixty-second birthday and was retired pursuant to the terms and conditions of the retirement agreement.

On February 21, 1968, more than one year after Respondent filed her charge with the EEOC and approximately five and one-half months after her retirement, the EEOC issued Guideline Section 1604.31(a), *Guidelines on Discrimination Because of Sex*, as amended February 21, 1968, 29 C. F. R. § 1604.31(a), wherein the EEOC declared that "(a) a difference in optional or compulsory retirement ages based on sex violates Title VII [of the Civil Rights Act of 1964]."

Subsequently, on April 7, 1969, after serving notice of the charge on the Petitioners and after conducting an investigation of the charge, the EEOC rendered a decision on the charge; it ruled that there was reasonable cause to believe that the Petitioners were committing an unlawful employment practice in violation of Title VII by maintaining a retirement plan which discriminated against the Respondent because of her female sex.

Thereafter and pursuant to Section 706(a) of Title VII, 42 U. S. C. § 2000e-5(a), conciliatory efforts were undertaken and being unable to reach an agreement that was mutually satisfactory to the parties, the EEOC notified Respondent by suit letter dated October 23, 1969, that

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1. The EEOC's April 7, 1969 decision in this case gives an accurate capsulation of the import of Respondent's charge of February 16, 1967 and reads as follows:

> Charging Party alleges that [Petitioner] Respondent Employer and [Petitioner] Respondent Labor Organization have committed and are committing an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964 by maintaining a retirement plan which discriminates against her because of her sex (female).

pursuant to Section 706(e) of Title 42 U. S. C. § 2000e-5(e), she was entitled to institute a civil action in the district court on the basis of her administrative charge.

On November 20, 1969, the Respondent, by her attorney, filed her complaint in the district court. The complaint was bottomed on the Respondent's retirement which she alleged violated her civil rights under 42 U. S. C. § 2000e-2(a) and (c).

In response to the complaint the Petitioner Company and Petitioner Union respectively moved to dismiss and for summary judgment on the theory that the trial court lacked jurisdiction over the matter because the Respondent had failed to duly and timely file her written charge with the EEOC as required by Section 706(d) of Title VII, 42 U. S. C. § 2000e-5(d).

Subsequently, upon leave of the trial court, the Petitioners joined in an Amended Motion to Dismiss which alleged three distinct grounds upon which the action could be dismissed: 1) that the trial court did not have subject matter jurisdiction over Respondent's complaint because she had failed to comply with the jurisdictional filing requirements of Section 706(d) of Title VII, 42 U. S. C. § 2000e-5(d); 2) that Congress did not intend Title VII of the Civil Rights Act of 1964 to apply to retirement plans; and 3) that § 1604.31 of the EEOC's *Guidelines on Discrimination Because of Sex* is arbitrary and capricious and that the Guideline should not be applied retroactively to charges filed prior to the effective date of the Guideline.

The district court dismissed Respondent's complaint, and as noted in the opinion of the Court below, the trial court's dismissal was premised upon the finding that Respondent had failed to duly and timely file a written charge with the EEOC. In addition to the district court's finding that the Repondent had failed to invoke its jurisdiction because of

her failure to comply with the jurisdictional filing prerequisites of Section 706(d), the trial court also recognized that it did not acquire subject matter jurisdiction over the cause of action because the charge filed with the EEOC was in fatal variance with the complaint.

Respondent appealed the trial court's order of dismissal to the Court below. On July 7, 1971, the Court of Appeals, in an opinion by Senior Circuit Judge F. Ryan Duffy, reversed the dismissal order, specifically holding that the district court had jurisdiction over Respondent's suit, that Congress intended Title VII to encompass retirement plans, and that Section 1604.31 of the EEOC's Guideline is not arbitrary and capricious.

On July 28, 1971, Petitioners filed a motion to stay the issuance of the mandate, pending the filing of this petition for certiorari. The Court below, by order dated August 2, 1971 which was received by Petitioners on August 3, 1971, granted the Motion For Stay of Mandate for a period of thirty days.

REASONS FOR GRANTING WRIT.

The decision of the Court of Appeals below should be reviewed because it passed upon important threshold Title VII questions which have not been settled by this Court. The ultimate resolution of these key issues will have a far-reaching financial impact upon not only the Petitioners in the instant case but upon the host of other companies and unions which have negotiated retirement plans that differentiate between men and women with respect to retirement age.

Exemplifying the broad economic effect this decision may have upon similarly situated companies and unions are two recent telephone calls which the attorneys for Petitioners received from legal counsel for two very large,

nationally known employers. The attorneys for these two concerns indicated they were following this case with great interest since their respective clients maintained retirement plans similar to the one under review. Like the Petitioners, these firms face potential large back pay suits by employees who were retired pursuant to plans negotiated before the 1964 enactment of Title VII and before the EEOC's 1968 pronouncement that Title VII prohibited these plans. There are countless other companies and unions who maintained similar plans and for whom this decision will have substantial, if not disastrous, financial significance.

In addition, and aside from the issues of first impression, the decision of the Court below should be reviewed because it contains holdings which are arguably in conflict with the decisions of other Circuits and because it disregards express statutory mandates. Moreover, the decision of the Court below should be reviewed because it sidesteps and leaves undecided certain difficult and fundamental questions raised by the Petitioners; Petitioners submit that had the Court of Appeals considered these questions it would not have reversed the dismissal of the district court.

1. The reversal by the court below of the trial court's dismissal of Respondent's complaint makes a travesty of and is in conflict with Section 706(d) of Title VII, 42 U. S. C. § 2000e-5(d) which provides that a charge shall be filed within the EEOC within ninety days *after* the alleged unlawful employment practice occurred.

It is well settled that compliance with the ninety day filing mandate of Section 706(d) is a jurisdictional precondition to the commencement of a court action. See, *e.g., Choate* v. *Caterpillar Tractor Company*, 7th Cir., 402 F. 2d 357, 359 (1968); *Fore* v. *Southern Bell Tel. & Tel. Co.*, 293 F. Supp. 587, 588 (W. D. N. C., 1968) ("It is true that the statute [§ 706(d)] requires the person aggrieved

to file a written charge within 90 days; it says so clearly, and the courts so hold.")

By Paragraph 9 of the complaint, the Respondent acknowledges and admits that she filed her written charge with the EEOC "prior" to the termination of her employment on June 30, 1967.[2] Respondent's complaint is bottomed on and seeks redress for the single, isolated event of her compulsory retirement on June 30, 1967, an event which occurred after the filing of her charge with the EEOC. Unless the complained of event of her compulsory retirement is considered a continuing violation, Section 706(d) requires that Respondent must have filed her charge with the EEOC within ninety days *after* the occurrence of the alleged unlawful retirement.

Petitioners readily agree that in a case where there is a "continuing violation" alleged the ninety days filing mandate of Section 706(d) is suspended and not applicable. *E. g., Cox* v. *U. S. Gypsum Company*, 7th Cir., 409 F. 2d 286 (1969).

Under the salient facts of the instant case, Respondent's action is not insulated from dismissal under the "continuing violation" theory because her compulsory retirement, the event upon which the complaint is premised, was not a "continuing act" or a "continuing violation". Rather, the compulsory retirement was a completed act when effected and is in the nature of a layoff, a discriminatory

2. Paragraph 9 of the Respondent's complaint states that:

> On February 16, 1967, prior to the commencement of this action, and *prior to termination of her employment*, * * *, the [Respondent] plaintiff charged in writing under oath that [Petitioner] Drewrys and the [Petitioner] Union * * * were engaging in an unlawful employment practice in violation of Title VII of the Act alleging maintenance by [Petitioner] Drewrys and the [Petitioner] Union of a retirement plan which discriminates against her because of her female sex, which said written charges under oath were duly and timely filed with the Equal Employment Opportunity Commission as required by the Act. (Emphasis added.)

recall, a discontinuance of a work assignment or a transfer. Both the General Counsel for the EEOC and the courts have held that the aforementioned unfair employment practices do not constitute continuing violations. See, *Burney* v. *North American Rockwell Corp.*, 302 F. Supp. 86, 92 (C. D. Cal., 1969); *Hutchings* v. *United States Industries, Inc.*, 309 F. Supp. 691 (E. D. Tex., 1969); *Younger* v. *Glamorgan Pipe & Foundry Co.*, 310 F. Supp. 195 (D. W. Va., 1969); the General Counsel's Opinion Letters have ruled that a transfer is not continuing (Op. Lt., Dec. 2, 1965), that the discontinuance of a work assignment is not continuing (Op. Lt., Nov. 26, 1965), that a layoff or discriminatory recall is not continuing (Op. Lt., Jan. 11, 1966), CCH *Employment Practices Guide*, ¶ 1255.75, .78 and .80.

Because Respondent's compulsory retirement does not constitute a continuing violation, it is clear that she did not have standing to file a charge on the basis of her actual retirement until it occurred on June 30, 1967 and that the ninety days filing requirement of Section 706(d) is operative. To satisfy the jurisdictional prerequisite of Section 706(d), Respondent's complaint, which is premised on and seeks redress for her alleged unlawful retirement, must be founded on a charge which was filed within ninety days after the occurrence of her retirement.

Since Respondent's charge was filed more than four months before her retirement and not within ninety days *after* the alleged unlawful retirement, she failed to timely comply with the filing requirements of Section 706(d). Clearly, the district court properly dismissed the employee's action on the basis of lack of jurisdiction, and the Court of Appeals erred in reversing that decision.

2. Petitioners also submit that in addition to the jurisdictional bar created by Respondent's premature filing of the charge, there is yet another equally significant and con-

terminous jurisdictional barrier to Respondent's suit which the Court below failed to recognize.

Petitioners submit that the decision of the Court of Appeals is erroneous and in conflict with the weight of authority in that it fails to comprehend the fatal variance which exists between the charge filed with the EEOC and the complaint filed in the trial court.

The nature of the unfair employment practice set forth in Respondent's EEOC charge is substantially different and materially varies from the allegations contained in Respondent's complaint. The charge addresses itself solely to the alleged continuing Title VII violation of maintaining a retirement plan which differentiates between males and females with respect to retirement age. The complaint, on the other hand, is fundamentally premised upon and seeks redress for the alleged noncontinuous Title VII violation of Respondent's own actual retirement. Underpinning this variance is the fact the charge and the complaint invoke wholly different remedial considerations. Respondent's charge before the EEOC attacks the general validity of an allegedly discriminatory retirement plan and inferentially prays for injunctive relief while the complaint in the district court seeks individual redress in the form of monetary remuneration and personal indemnification.

Where, as here, the allegations of the complaint do not fall within the scope of the charge, it is uniformly held that the trial court is without subject matter jurisdiction. *Mickel* v. *South Carolina State Employment Service*, 4th Cir., 377 F. 2d 239, *cert. denied*, 389 U. S. 877, 88 S. Ct. 177, 19 L. Ed. 2d 166 (1967); *Edwards* v. *North American Rockwell Corp.*, 291 F. Supp. 199, 203-04 (C[illegible] Cal., 1968); *Allen* v. *Lockheed-Georgia Company*, 61 L. C. ¶ 9183 (N. D. Ga., 1968).

Respondent's retirement occurred after she filed her

EEOC charge. Thus, the very premise of Respondent's complaint was not and could not have been included in her charge to the EEOC and as stated in *Edwards* v. *North American Rockwell Corp.*, *supra* at 203:

> Any allegations in the complaint referring to matters occurring *after* the filing of a charge must necessarily be considered as allegations concerning which no charge has been filed for purposes of this Court's subject matter jurisdiction. (Emphasis added.)

The effect of the reversal of the trial court by the Court below is to permit a material variance between the nature of the charge and the complaint and to allow the charge and the complaint to invoke wholly different remedial considerations. To so condone the commencement of a civil suit founded upon allegations not contained in the charge is to invite an allegedly aggrieved person to bypass the filing requirement of Section 706(d) and to avoid the conciliation efforts of the EEOC, as provided for under Section 706(a), 42 U. S. C. § 2000e-5(a). This Court should now speak out to restore the sanctity of these statutory provisions and to protect the statutory scheme Congress established to resolve alleged Title VII violations.

3. The decision of the Court below completely ignores and sidesteps the difficult but equitably based question of whether the Respondent should be estopped and not heard to complain that she is an "aggrieved person" within the meaning of Section 706(a) of Title VII, 42 U. S. C. § 2000e-5(a).

Petitioners urged by brief and on oral argument in the Court below that Respondent should not be heard to contest her retirement since it was effected pursuant to a collective bargaining agreement which was adopted several years be-

fore the enactment of Title VII [3] as a result of negotiations by Respondent's own duly elected bargaining agent, the Petitioner Union. Additionally, Respondent derived and accepted benefits from the plan she now challenges.

Petitioners submit that under this posture of facts the Respondent is not an aggrieved person and should be

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3. The Petitioners are aware of the cases which hold that Title VII, notwithstanding its prospective application, applies to situations where there are "present and continuing effects of past discrimination [pre-1964 discriminatory acts.]." *E.g., Griggs v. Duke Power Company*, 4th Cir., 420 F. 2d 1225, 1230 (1970), *rev'd on other grounds*, 400 U. S. 813, 95 S. Ct. 849, 28 L. Ed. 2d 158.

The above rule is highly unfair when applied to the facts of this case since at the time of the passage of the Act many organizations like these Petitioners were posited in the unenviable position of not knowing whether Congress intended Title VII to encompass retirement plans. They were left in this unpleasant limbo from the time of the passage of the Act in 1964 to 1968 when the EEOC issued its Guidelines 1604.31(a). During this interim, Petitioners were forced between the horns of dilemma. If they had proceeded to abruptly amend the retirement plan in 1964 to equalize male and female retirement ages, they faced the possibility of law suits and discontent by females who had relied on a retirement at age sixty-two. Failing to amend the plan in 1964 meant risking Title VII violations if the EEOC should later decide Congress intended the Act to apply to retirement and pension plans. Consequently, the Petitioners were truly locked into a position where there were no alternatives to avoid the hazard of law suits and employee discontent. This dilemma could have been eliminated had the EEOC taken an immediate stand on the issue of whether Title VII applied to retirement programs.

Under these circumstances, the Petitioners invite this Court, as it did the Court below, to carve out an equitable exception to the harsh general rule that Title VII applies to present and continuing effects of lawful pre-1964 activities. Such an equitable exception could be limited to situations where, as here, the unlawful present consequences of lawful pre-1964 activities are the direct and proximate result of the EEOC's failure to issue directive guidelines relative to legitimate questions anent the application and scope of Title VII.

Under the existing circumstances, a failure to carve out a needed equitable exception to the above rule would be tantamount to holding the Petitioners responsible for the results of an agency delay in issuing an administrative guideline.

precluded from attacking the plan her agent negotiated and should be deemed to have waived her rights to claim a loss as a result of the plan from which she derived and accepted benefits. To this end see Seavey, *Law of Agency* § 75 p. 127 (1964 ed.) wherein it is stated that where "a principal [such as the Respondent] invites third persons [the Petitioner Company] to deal with an agent [the Petitioner Union] on terms which will be given by the agent, he is bound by the terms as stated by the agent." Accordingly, the Respondent should be bound by the terms of the retirement plan and not permitted to complain of its alleged unlawfulness. *Cf., Singer* v. *A. Hollander & Sons, Inc.*, 3rd Cir., 202 F. 2d 55 (1953).

The failure of the Court of Appeals to treat and dispose of these troublesome contentions is surprising in view of the fact that the court intimated by its questions during oral arguments that it was bothered by the underlying equitable question of whether Respondent should be heard to complain of a retirement plan her agent negotiated and adopted long before the enactment of Title VII. To continue to leave this issue undecided is to sidestep the fundamental question of whether Respondent had cause to file suit in the instant case and to permit her to reap an unexpected windfall by the fortuitous event of the passage of the 1964 Civil Rights Act.

4. This case presents squarely the economically far-reaching issue of whether Congress intended Title VII of the Civil Rights Act of 1964 to apply to retirement and pension plans.

Research has revealed only one other recently reported decision which rules on this threshold issue. The issue was decided in *Rosen* v. *Public Service Electric & Gas Co.*, ... F. Supp. ....., 2 FEP cases 1090 (N. J. 1970); the New Jersey district court upheld the EEOC's 1968 Guideline that Congress intended Title VII to encompass retirement plans.

In holding Title VII prohibited sex differentials in retirement plans, the Court below placed great reliance on the *Rosen* case and the general principle that administrative interpretations of statutes, such as Guideline 1604.31, are entitled to great deference.

For cogent reasons not adequately considered in the New Jersey decision or the opinion below, the Petitioners submit that the conclusion reached in these two cases is erroneous and should be overturned by this Court.

First, the reliance of the Court of Appeals on the general principle that an administrative construction of a statute is entitled to special weight is inapposite to the instant case. That principle does not apply where, as here, the agency's interpretation is not based upon its own accumulated knowledge and experience and where, as here, the interpretation is neither continuous nor contemporaneous with the enactment of the statute. *E.g., Drew* v. *Lawrimore*, 257 F. Supp. 659 (S. C., 1966), *rev'd on other grounds*, 4th Cir., 380 F. 2d 479 (1967); *Hess* v. *Esperdy*, 234 F. Supp. 909 (S. D. N. Y., 1964). It certainly cannot be concluded that Guideline 1604.31 was either continuous or contemporaneous with the 1964 enactment of Title VII since it was issued almost *four years* after the passage of Title VII; nor can it be said that the Guideline was promised on the accumulated knowledge of this young agency.

In deciding whether Congress intended Title VII to apply to retirement plans containing sex differentials, it is instructive to note that none of the Act's provisions specifically prohibit such differences nor do any of the Act's provisions provide that retirement programs are within the statutory purview of Title VII.

Despite the broad language of Section 703(a) and (e) of Title VII, the distinct absence of any such provision in Title VII is strong evidence that Congress did not intend Title VII to encompass retirement programs. At the time

of Title VII's enactment, Congress was cognizant of the fact that many private retirement plans, state laws and federal retirement programs accorded different treatment to male and female employees with respect to retirement ages and benefits. It is logical to conclude that if Congress had intended to disrupt the operation of the various existing retirement programs, it would have specifically provided in its legislation that Title VII bars sex differentials in retirement plans, or at the very minimum, Congress would have indicated that Title VII generally applies to private retirement plans.

To contend that Congress intended to inferentially upset longstanding retirement plans by its enactment of Title VII is ludicrous when it is recognized that many existing federal programs contain sex differentials.[4]

A recent case on point is *Gruenwald* v. *Gardner*, 2nd Cir., 390 F. 2d 591 (1968), *cert. den.*, 393 U. S. 982 (1968). In that case the court held that there was no merit in the contention that the sex inequalities in the social security retirement benefit program violated Title VII of the Civil Rights Act of 1964.

A review of the legislative history of the Act, as reported in the 1964 U. S. Code Cong. and Adm. News, p. 2355, *et. seq.*, sheds little light on the specific issue of whether Congress intended Title VII to bar sex differentials in retirement plans. A strong indication of Congressional intent can be garnered, however, by a review of a letter from Senator Humphrey, Floor Manager of the Civil Rights Bill in 1964. Humphrey's letter, segments of which are set forth in the Prentice Hall "Pension and Profit Sharing" Report Bulletin 4, May 12, 1969, stated that "It would be a gross distortion of the provisions of Title VII to apply this language in a manner which impaired existing

4. *E.g.*, the Social Security Act, the Railroad Retirement Act, and the Federal Civil Service Act all contain provisions affording different treatment to men and women.

pension, retirement, or benefits programs." Report Bulletin 4, *supra*, also notes that Humphrey stated on the floor of the Senate "that it was 'unmistakably clear' that earlier retirement options for women could continue in operation under the Act."

Thus, in light of the available legislative history, and with the knowledge that federal retirement programs treat men and women differently, and in view of Congress' failure to specifically bar sex differentials in Title VII, it was erroneous and unreasonable for the EEOC, the *Rosen* case, and the Court below to construe Title VII to prohibit sex differentials in existing private retirement plans.

The decision below amounts to judicial legislation for it carries Title VII far beyond its Congressionally intended function and into the area of retirement plans. It is for Congress and not the Courts or the EEOC to decide whether sex differentials in retirement plans should be prohibited.

5. This Court should grant certiorari to consider two important issues of first impression. The first issue relates to whether the EEOC's *Guideline on Discrimination Because of Sex*, 29 C. F. R. 1604.31,[5] is arbitrary and capricious with the meaning of Section 706(2)(A) of the Administrative Procedure Act, 5 U. S. C. § 706(2)(A); the second issue raises the difficult question of whether the Guideline should be given retroactive effect.

The Court below completely ignored the retroactivity issue and disposed of the first issue in a very cursory fashion by holding that the Guideline was not capricious notwithstanding its built-in grace period which arbitrarily afforded some firms temporary insulation from Title VII charges.

---

5. The EEOC Guideline, issued four years after the passage of Title VII, pronounced that sex differentials in retirement plans were violative of Title VII.

Petitioners submit to this Court that the Guideline represents the very zenith of arbitrariness and capriciousness. It provides that Title VII shall be applicable to charges filed before February 21, 1968 (date on which the Guideline was issued) and to charges filed after its effective date of July 1, 1968 (subsequently changed to October 1, 1968) but will be inapplicable to charges filed after February 21, 1968 and prior to October 1, 1968. EEOC Decision No. 70-45, July 18, 1969, CCH *Labor Law Reporter* ¶ 8089, supports this interpretation of the Guideline.[6]

This grace period afforded to some companies by the Guideline and not others lacks a rational basis, offends all notions of justice and equal treatment and clearly should be held arbitrary and capricious under Section 706(2)(A) of the Administrative Procedure Act. It makes no sense to hold that Section 1604.31(a) is applicable to charges filed before the date of its issuance and inapplicable to charges filed after its issuance date and prior to its effective date.[7]

In addition to the question of whether the Guideline is arbitrary and capricious, there is the equally significant issue of whether the Guideline should be applied retroactively to charges filed before the Guideline's issuance date. In failing to rule on this retroactivity issue, the

6. If Congress did intend Title VII to apply to retirement plans, then how can the EEOC constitutionally, legally or equitably insulate some companies and unions and not *all* by administrative fiat?

7. Further compounding the confusion is the fact that General Counsel issued an Opinion Letter on September 13, 1968, stating that Title VII "would permit * * * gradual adjustment" of existing retirement plans that provide for earlier optional retirement of women. How can one reconcile the Commission's position that Section 1604.31(a) definitely applies to charges before February 21, 1968, and after October 1, 1968, with the Commission's opinion letter that Title VII permits gradual adjustment of existing retirement plans? *Op. Ltr.* 9/13/68, CCH *Employment Practice Guide* ¶ 16,900.31.

Court below inferentially condoned retrospective application of the Guideline.

Petitioners vigorously urge that it is an abuse of discretion to apply Title VII to charges filed before the Guideline's issuance date, February 21, 1968.

While the EEOC Guideline does not have the binding force or effect of law, *American Newspapers Publishing Association* v. *Alexander*, 294 F. Supp. 1100, 1103 (D. D. C., 1968), it is in the nature of a new policy to the extent it officially establishes for the first time that the EEOC would apply Title VII to retirement plans which provide different optional or compulsory retirement ages for male and female employees. Prior to the Guideline, the EEOC had not established a definitive policy relative to whether Title VII applied to retirement plans.[8] *Cf., Air Transport Association of America* v. *Hernandez*, 264 F. Supp. 227, 229 (D. D. C., 1967) ("* * * no matter what its administrative nomenclature, it [a Commission interpretative Guideline] has the effect of law.").

The "first rule of construction is that legislation must be considered as addressed to the future, not to the past. * * * [and] a retrospective operation will not be given to a statute which interferes with antecedent rights * * * unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" *Union Pac. R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190, 199 (1913). See also, *Greene* v. *United States*, 376 U. S.

8. The only EEOC indication which was available before the issuance of the 1968 Guideline with respect to the question of whether Title VII applied to retirement plans was the 1967 General Counsel's Opinion Letter to the effect that Title VII did not apply to the Railroad Retirement Act's disparity in retirement ages for male and female employees. (*Op. Ltr.*, February 24, 1967, LRX 2135.) Accordingly, Petitioners are arguably insulated under the authority of Section 713(b) of Title VII, 42 U. S. C. § 2000e-12(b), from any liability for the alleged unlawful retirement of Respondent.

149 (1964) (wherein the Court held that it was "unjustifiable" to give a 1960 Department of Defense regulation retroactive effect). In *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 280 n. 35 (1969), this Court stated "there is no reason why the principles that control legislation that affects contractual rights should not also control administrative rule making that affects contractual rights."

In determining whether an administrative ruling or finding should be given retroactive effect, the reviewing court *should test* to see whether "the practical operation of the * * * change of policy * * * [will] work hardship upon respondent altogether out of proportion to the public ends to be accomplished." *NLRB* v. *Guy F. Atkinson Co.*, 9th Cir., 195 F. 2d 141, 149 (1952). See also, *Securities and Exchange Comm.* v. *Cheney Corp.*, 332 U. S. 194 (1947); *NLRB* v. *E & B Brewing Company*, 6th Cir., 276 F. 2d 594 (1960), *cert. den.* 366 U. S. 908. The Court below failed to decide the question of whether the Guideline should be given retroactive application, and by so failing, it inferentially approved of retrospective application.

Without question, retroactive application of the Guideline works hardships on the Petitioners altogether out of proportion to the public ends to be accomplished; it gives Respondent an unexpected windfall by penalizing Petitioners for conduct they had no way of knowing was violative of Title VII. "It is this sort of thing our system of law abhors." *NLRB* v. *Guy F. Atkinson Co., supra* at 149.

Because of the sweeping financial importance of this question to the numerous firms and unions who retired employees pursuant to similar retirement plans, this Court should grant certiorari and avoid having the issue decided by inference as a result of the lower court's failure to pass upon the question.

CONCLUSION.

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JAMES W. OBERFELL,
CRUMPACKER, MAY, LEVY & SEARER,
224 West Jefferson Boulevard,
South Bend, Indiana 46601,
Attorney for Petitioner, Local Union No. 275, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO,

WARREN E. MCGILL,
THORNBURG, MCGILL, DEAHL, HARMAN, CAREY & MURRAY,
645 First Bank Building,
South Bend, Indiana 46601,
Attorney for Petitioner, Drewrys Limited U. S. A., Inc.

Of Counsel:
WARREN A. DEAHL,
FREDERICK F. THORNBURG,
THORNBURG, MCGILL, DEAHL, HARMAN, CAREY & MURRAY,
645 First Bank Building,
South Bend, Indiana 46601.

APPENDIX A.

1. COURT OF APPEALS DECISION.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 18724 September Term 1970 — April Session 1971

ANN BARTMESS,
Plaintiff-Appellant,
v.
DREWRYS U. S. A., INC., LOCAL UNION NO. 275, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

July 7, 1971

Before DUFFY, *Senior Circuit Judge*, FAIRCHILD and CUMMINGS, *Circuit Judges*.

DUFFY, *Senior Circuit Judge*. The plaintiff-appellant, Ann Bartmess, was a former non-supervisory employee of Drewrys Limited, U. S. A., Inc. (hereinafter referred to as Drewrys or Company). She was a member of defendant-appellee Union, No. 275. The Union was the exclusive bargaining agent for Drewrys' employees such as plaintiff. A retirement plan was adopted pursuant to a collective bargaining agreement negotiated by the Union and Drewrys.

The retirement plan became effective on May 1, 1955 wherein it was agreed that female employees of the Company were to retire at age 62 and male employees were to retire at age 65.

About four and a half months before plaintiff's retirement, she filed an administrative charge with the Equal Employment Opportunity Commission (EEOC). The charge alleged that the Company and the Union were committing an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, by maintaining a retirement program which discriminated against her because of her sex.

On June 30, 1967, plaintiff passed her 62nd birthday and was retired pursuant to the terms and conditions of the retirement agreement.

On February 21, 1968, more than one year after plaintiff filed her charge with EEOC, and approximately five and a half months after her retirement, the EEOC issued guideline Section 1604.31(a) wherein it was declared that "(a) difference in optional or compulsory retirement ages based on sex violates Title VII [of the Civil Rights Act of 1964]."

Conciliatory efforts were undertaken by the parties and, being unable to reach an agreement that was satisfactory to plaintiff, the EEOC notified her on October 23, 1969 that she was entitled, on the basis of her administrative charges, to institute civil action in the District Court within a period of 30 days. Plaintiff filed this suit under Title VII of the Civil Rights Act of 1964 within that time.

Both defendants moved to dismiss the complaint on three grounds; that plaintiff's complaint was not timely filed; that the 1964 Civil Rights Act did not apply to retirement plans having different mandatory retirement ages for men and women, and that Section 1604.31 of the EEOC guidelines was arbitrary and capricious.

The District Court held the only unlawful practice charged here was the actual discharge upon retirement, and that as plaintiff had not waited until after her retirement to file her grievance, she was barred from relief. This appeal followed.

Jurisdiction.

The first issue before us is whether plaintiff invoked the administrative procedure of the 1964 Civil Rights Act in a timely manner or whether she is now barred from relief because she did not wait until the actual date of her retirement before filing a charge with the EEOC. The relevant statutory provision states:

> "A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred." 42 U. S. C. 2000e-5(d) (Title VII, Section 706(d)).

It is settled law that the ninety day limitation is no bar when a continuing practice of discrimination is being challenged rather than a single, isolated discriminatory act. *Cox* v. *United States Gypsum*, 409 F. 2d 289 (7 Cir., 1969). Appellees concede that this is the law, but argue that the only potentially unlawful practice under a retirement plan is the actual discharge and not the overall maintenance of the plan. We disagree. We have no difficulty in concluding that the actual maintenance of a discriminatory retirement plan can be one of the acts which "adversely affect [an individual's] status as an employee, because of such individual's . . . sex," and that retirement plans should be viewed as "conditions of employment" within the meaning of Section 703 of Title VII (42 U. S. C. 2000e-2(a)).

The collective bargaining agreement in force at the time plaintiff filed her charge provided that female employees must retire three years prior to their male counterparts. If

such a contract is found to be discriminatory, its mere presence in a collective bargaining agreement would render female workers "aggrieved persons" within the meaning of Title VII and would continue to do so for the entire time the individual was employed.

This Court has considered the impact of a retirement plan's terms on the employee's employment status in *Inland Steel* v. *N. L. R. B.*, 170 F. 2d 247 (7 Cir., 1948), cert. den. 336 U. S. 960. We there concluded that an employee's present interest in a plan for his retirement was sufficient to make such a plan an "other condition of employment" within the meaning of the National Labor Relations Act, even though retirement might not take place for many years. Likewise, we feel that an employee's interest in such a plan is sufficiently important to allow him or her to challenge an aspect of that plan in advance of retirement when it is believed to violate Title VII. We thus construe Title VII in harmony with the N. L. R. A. on this point.

Appellees advance a second reason why the jurisdictional provisions of Section 706 should be held to bar plaintiff's suit. Appellees argue that the only unlawful employment practice challenged in the complaint was the termination of employment, and that thus there is a fatal variance with the administrative charge, which challenged the maintenance of the discriminatory plan as well. We find no such variance to be present.

Paragraph 8 of the complaint reads in full:

> Drewrys terminated plaintiff's employment pursuant to the terms of a retirement program agreement between Drewrys and the Union, the retirement provisions of which required compulsory retirement of male employees at age 65 and compulsory retirement of female employees at age 62, by reason of which and thereby Drewrys discriminated against the plaintiff, a female person, because of her sex by maintaining a

> compulsory policy of forcing men to retire at age 65 and women to retire at age 62, and by terminating her employment by forcing her to retire after she passed her sixty-second birthday which is an unlawful employment practice in violation of Title VII, Section 703(a) of the Act (Title 42, Section 2000e-2(a)), which said unlawful practice was committed at South Bend, Indiana, within the jurisdiction of this court.

It is clear that both the "maintenance of a compulsory policy" as well as the most immediate consequence of that policy, e.g., the termination, were challenged in the complaint.

Since all of the other jurisdictional prerequisites of Section 706 are present here, we find that jurisdiction under Title VII is present.

Whether a Claim Is Stated.

We are next called upon to decide whether retirement plans containing differing treatment of men and women with respect to retirement ages violates Title VII of the 1964 Civil Rights Act. The only decision directly on point has answered this question affirmatively. *Rosen et al.* v. *Public Service Electric Company,* ..... F. Supp. ..... (D. C. N. J., 1970) (3 Employment Practices Divisions 6208) (affirmed on rehearing 3 E. P. D. 6216). We agree with the holding of the *Rosen* Court.

As mentioned heretofore, we read Title VII to include retirement plans as "conditions of employment" just as they are similarly viewed under the National Labor Relations Act. *Inland Steel Co.* v. *N. L. R. B., supra.* Title VII forbids any discrimination with respect to such conditions of employment. Furthermore, the Act proscribes classifications by employers ". . . which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such

individual's . . . sex . . ." Section 703(a)(2) [42 U. S. C. § 2000e-2(a)(2)]. Similar prohibitions against such classifications by labor organizations are contained in Section 703(c)(2) [42 U. S. C. § 2000e-2(c)(2)].

A plain reading of the statute indicates that retirement plans which treat men and women differently with respect to their ages of retirement are prohibited. The plaintiff here, by virtue of the plan, is forced to give up three years of work together with the money she would have earned during that period. Such a forced retirement is tantamount to a discharge. Moreover, the classification of employees on the basis of sex is, of itself, contrary to the intent of Title VII. *Rosen, supra; Sprogis* v. *United Air Lines*, ... F. 2d ..... (7 Cir., 1971—Slip opinion #18481).

In *Sprogis*, we recently noted that: "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Defendants have come forward with no reasons why we should conclude that the language of Title VII does not mean what it says.

Instead, defendants urge that the legislative history of Title VII indicates that retirement plans were not intended to be covered when the Act was passed. We cannot agree that such an intent has been demonstrated. Defendants rely heavily on a letter written by Senator Humphrey stating his belief that retirement plans were not within the scope of the Act. But this letter was written several years after the passage of Title VII and has no bearing on the question of Congress' intent.

Congress did grant certain express exceptions to the Title VII's sex discrimination provisions, but exemption of retirement plans was not one of them. The *Rosen* Court faced the same question and, after a thorough study of the legislative history, concluded that: "[t]he debates in Con-

gress neither support nor refute Senator Humphrey's letter." We conclude that absent some strong indication of legislative intent to the contrary, we must read the words of the statute with their commonly accepted meanings. *Rosen, supra,* at ..... . We therefore hold that discrimination in retirement plans in this case violates Title VII.

We note further that the EEOC guideline on retirement plans (29 C. F. R. Section 1602.31(a)) states that "[a] difference in optional or compulsory retirement ages based on sex violates Title VII" and that such an ". . . administrative interpretation of the Act by the enforcing agency is entitled to great deference." *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 434-5 (1971). This guideline is consistent with the language of the Act and we concur in it.

It does not matter for our purposes that the guideline was not drafted until after this present charge was filed. EEOC guidelines, while "entitled to great deference," do not have the force of law and cannot abrogate rights enforceable under the 1964 Civil Rights Act. *American Newspaper Publishing Association* v. *Alexander,* 294 F. Supp. 1100 (D. C. D. C. 1969).

The relevant date when those rights became enforceable was the effective date of the Civil Rights Act, not the date of the guideline. The defense of good faith reliance on a written opinion of the Commission available under Section 713 of the Act is not applicable here. See *Sprogis, supra,* (Slip Opinion, pp. 7-8).

We have reviewed appellees' contentions that this EEOC guideline is arbitrary and capricious in operation and find them to be without merit. The fact that a minimal grace period is adopted in the guideline does not mean that it works capriciously with respect to charges filed prior to that time. The guideline could not, under the law, have served to cut off claims already before the Commission.

The order appealed from is reversed, and this cause is remanded to the District Court for a trial on the merits.

Reversed and Remanded.

2. In dismissing the Respondent's complaint, the district court stated from the bench that:

> The Court doesn't know any way to read this Complaint except that it is a Complaint filed bottomed upon her alleged—upon her grievance that she was terminated because of the provisions of this retirement program.
>
> If these guidelines that were later announced had been in effect then, they might have been the subject of negotiations and a termination might never have come to pass.
>
> The Court believes that this Complaint, which alleges her employment in '44; that she continues without interruption until June 30, 1967, when she passed her 62nd birthday on which she terminated her employment, and then in the next paragraph they terminated her employment pursuant to the terms of a program, and that by terminating her employment, [57] by forcing her to retire after she passed that birthday, they—which is, she alleges, and unlawful employment act in violation of Title 7, and this Court has no hesitancy, under this interpretation of this Complaint, to hold that she has not complied timely with the notice requirements, filed her charge with the Equal Employment Opportunities Commission, as required by the Act, and, therefore, the Motions to Dismiss are each now granted. (Supp. Appendix, p. 37.)

The district court order, entered July 2, 1970, reads in relevant part:

> Hearing had on pending motions. Court hears argument of counsel. Defts' amended motions to dismiss (Summary Judgment) are each now granted.

APPENDIX B.

1. Section 2000e-2(a) and (c) of Title 42 of the United States Code provides in material part that:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *.
>
> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to limit, segregate, or classify its membership * * * in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise affect his status as an employee * * * because of such individual's * * * sex * * *; or
>
> (2) to cause or attempt to cause an employer to discriminate against an individual in violation of this Section.

2. Section 2000e-5(a), (d) and (e) of Title 42 of the United States Code provides in material part:

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved * * * that an employer, * * * or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, * * * or labor organization * * * with a copy of such charge and shall make an investigation of such charge, * * *. If the Commission shall determine, after such investigation, that there is rea-

sonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. * * *.

(d) A charge under Sub-section (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred * * *.

(e) If * * * the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, * * *.

3. Section 2000e-12(b) of Title 42 of the United States Code provides in material part:

(b) * * * no person shall be subject to any liability * * * on account of (1) the commission by such person of an unlawful employment practice if * * * the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the commission * * *.

4. Section 706(2)(A) of Title 5 of the United States Code provides in material part:

The reviewing court shall—* * * (2) hold unlawful and set aside agency action, findings and conclusions found to be

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

APPENDIX C.

The Equal Employment Opportunity Commission's *Guidelines on Discrimination Because of Sex,* Section 1604.31(a) and (b), as amended February 21, 1968, 29 C. F. R. § 1604.31(a) and (b) provides in material part that:

> (a) A difference in * * * retirement ages based on sex violates Title VII.
>
> (b) * * * these interpretive rules * * * shall become effective immediately and shall be applicable with respect to charges presently before or hereafter filed with the Commission, except that Section 1604.31(a) will become effective July 1, 1968 [subsequently changed to October 1, 1968] with respect to charges hereafter filed with the Commission.

FILED
SEP 23 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-321

DREWRYS LIMITED U. S. A., INC. AND LOCAL UNION NO. 275, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO,
Petitioners,

vs.

ANN BARTMESS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

JOHN W. MONTGOMERY,
MONTGOMERY & ZIMMERMAN,
708 Tower Building,
South Bend, Indiana 46601,
Attorney for the Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court is not reported. The opinion of the Court of Appeals is not yet officially reported. Both opinions (including the District Court's oral decision) are reproduced as Appendix "A" to the Petition for Writ of Certiorari.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 7, 1971. The Clerk of this Court informed Respondent, upon inquiry, that a Petition for Writ of Certiorari was docketed on August 1, 1971, no notice thereof having been given by Petitioners in accordance with Rule 21. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED.

The statute involved is Title VII of the Civil Rights Act of 1964 (hereinafter called the Act). The relevant provisions of Title VII are 42 U. S. C. 2000e-2(a) and (e), 2000e-5(a), (d) and (e) and 2000e-12(b) and are set forth in the Appendix to this Brief *infra* at page A1.

The regulation is the Equal Employment Opportunity Commission (hereinafter EEOC) *Guidelines on Discrimination Because of Sex*, 29 C. F. R. Sec. 1604.31 and is set forth in the Appendix to this Brief *infra*, page A3.

QUESTIONS PRESENTED.

1. Is a female employee prior to her mandatory retirement a "person aggrieved" within the meaning of the Civil Rights Act of 1964 with standing to challenge the maintenance of a sex-based discriminatory retirement plan as a *present* discriminatory "condition" of employment?

2. Is there a variance between an administrative charge of discrimination alleging the maintenance of a sex-based discriminatory retirement plan and which also predicts in its text the charging party's mandatory retirement pursuant thereto if the plan continues and a subsequently filed judicial complaint alleging the maintenance of a sex-based discriminatory retirement plan and that a consequence of the continued maintenance of the previously administratively challenged retirement plan was the predicted mandatory retirement of the charging party?

3. Does a retirement plan which treats men and women differently in respect of their ages of retirement violate Title VII of the Civil Rights Act of 1964?

4. Can the EEOC's *Guidelines on Discrimination Because of Sex*, 29 C. F. R., Section 1604.31, be successfully interposed by Petitioners as an affirmative defense to nullify the Civil Rights Act of 1964 and to escape liability under Title VII of the Act?

STATEMENT OF THE CASE.

The Respondent does not accept the Petitioners' statement commencing at line 5 on page 7 of the Petition: "The complaint was bottomed on the Respondent's retirement which she alleged violated her civil rights under 42 U. S. C., Section 2000e-2(a) and (c)."

The Respondent's complaint alleged the maintenance by the Petitioners of an unlawful retirement plan discriminatory on the basis of sex and that a consequence of the continuance of that plan was her mandatory retirement at age sixty-two.

The Respondent does not accept the Petitioners' statement in the last paragraph commencing on page 7 of the Petition: "as noted in the opinion of the Court below, the trial court's dismissal was premised upon the finding that Respondent had failed to duly and timely file a written charge with the EEOC. In addition to the District Court's finding that the Respondent had failed to invoke its jurisdiction because of her failure to comply with the jurisdictional filing prerequisite of Section 706(d), the trial court also recognized that it did not acquire subject matter jurisdiction over the cause of action because the charge filed with the EEOC was in fatal variance with the complaint."

The District Court having erroneously concluded that the allegations of Respondent's judicial complaint were not consistent with her administrative charge then asserted the equally erroneous conclusion that Respondent had not timely filed her administrative charge because she lacked standing to do so at the time of its filing. This does not amount to a determination that the District Court lacked subject matter jurisdiction; rather it is a finding that, given

the District Court's view of the pleadings, Respondent lacked standing to invoke that jurisdiction.

Since the Court of Appeals reversed the District Court's threshold findings (and properly so), subject matter jurisdiction is implicitly found as the mandate makes clear. In short, the Court of Appeals held, and thus determined, that the District Court should have found that Respondent in fact had standing to invoke Title VII.

ARGUMENT.

The issues in the present case are simple and settled and no amount of sophistry can convert this case into one warranting review by this Court on certiorari.

To focus attention on precisely what are offered as issues for Supreme Court determination, it may be pointed out that the petitioners' basic contention that the terms of a retirement plan are not a "condition of employment" was rejected more than twenty years ago and that the decision of the Court of Appeals in this case holding that the terms of a retirement plan are a "condition of employment" is supported by an inexhaustible and unbroken line of appellate authority.

Similarly, the issue as to whether the EEOC *Guidelines on Discrimination Because of Sex* can be interposed by the petitioners to escape liability under the Civil Rights Act of 1964 has been decided adversely to the petitioners. The decision of the Court of Appeals that the date that respondent's rights became enforceable was the effective date of the Civil Rights Act and not the date of the *Guideline* is supported by uniform and persuasive appellate authority that administrative guidelines and regulations do not have the force of law and cannot abrogate rights established by law.

Other issues raised by the petition are peripheral and procedural and were correctly decided by the Court of Appeals in harmony with long established and well-settled principles. They involve no question of federal law.

The decision of the Court of Appeals is manifestly correct. There is no asserted conflict of decision among the circuits nor is there an important question of federal law requiring decision by this Court.

I.

AN EMPLOYEE HAS A PRESENT INTEREST IN THE TERMS OF A RETIREMENT PLAN ESTABLISHING DIFFERENT RETIREMENT AGES BASED ON SEX AND IS A "PERSON AGGRIEVED" WITH STANDING TO CHALLENGE THE MAINTENANCE OF SUCH POLICY AS A PRESENT DISCRIMINATORY "CONDITION" OF EMPLOYMENT.

Petitioners attack as palpably incorrect the holding of the Court of Appeals that respondent Ann Bartmess, as an employee, had a present interest in the maintenance of a retirement plan which regulated the terms and tenure of her employment. To reach this conclusion petitioners have completely ignored the simple fact that all that the Court of Appeals did was apply to Title VII a settled principle of labor relations which was developed by the courts more than twenty years ago under The National Labor Relations Act. The application of this principle to Title VII fits squarely within the statutory structure and fits within the unbroken line of appellate authority on the issue of Title VII standing.

One of the most stable and, indeed, unquestioned principles of our national labor policy is that a retirement plan is a "condition of employment" of those who are subject to its provisions. *Inland Steel Co.* v. *N. L. R. B.*, 170 F. 2d 247 (7th Cir., 1948), *cert. den.* 336 U. S. 960 (1949); *W. W. Cross Co., Inc.* v. *NLRB*, 174 F. 2d 875 (1st Cir., 1949); *Retail Clerks Union No. 1550, et al.* v. *N. L. R. B.*, 330 F. 2d 290, 215 (D. C. Cir., 1964), *cert. den.* 379 U. S. 823 (1964).

The same reasons that compel the conclusion that a retirement plan is a "condition of employment" under the NLRA compel the same conclusion under Title VII. In 1949 in the landmark *Inland Steel* decision the Court of Appeals

for the Seventh Circuit rejected the very same contentions which the petitioners in this case have made to that same Court twenty-three years later and which they now make to this Court. The *Inland Steel* court rejected as "without logic" the assertion that "an employee [such as respondent herein] is a stranger to a retirement and pension plan during all the days of his employment and that it affects him in no manner until he arrives at the retirement age."

The Court's reasoning in *Inland Steel* permitting Unions to bargain is this (170 F. 2d at 253):

> "Suppose that a person seeking employment was offered a job by each of two companies equal in all respects except that one has a retirement and pension plan and that the other did not. We think it reasonable to assume an acceptance of the job with the company which had such plan. Of course, that might be described merely as the inducement which caused the job to be accepted, but on acceptance it would become, so we think, one of the 'conditions of employment'. Everyday that such an employee worked his financial status would be enhanced to the extent that his pension benefits increased, and his labor would be performed under a pledge from the company that certain specified monetary benefits would be his upon reaching the designated age. It surely cannot be seriously disputed but that such a pledge on the part of the company forms a part of the consideration for work performed, * * *. In this view, the pension thus promised would appear to be as much a part of his 'wages' as the money paid him at the time of the rendition of his services. But again we say that in any event such a plan is one of the 'conditions of employment' ".

If these truisms concerning employee interest in retirement plans compel a company to bargain collectively with its employees' certified bargaining agent over "conditions of employment" in retirement plans, it is absurd to argue, as do petitioners, that a negotiated retirement plan al-

legedly violative of Title VII is not subject to challenge until one is compelled to retire pursuant to its terms.[1]

Section 703(a) and (c) (42 U. S. C. Sec. 2000e-2(a) and (c) say "(a) It shall be an unlawful employment practice for an employer—(1) * * * to *discharge* any individual, or otherwise to discriminate against any individual with respect to his *compensation, terms, conditions,* or *privileges* of employment, because of such individual's * * * sex * * * or; (2) to *classify* his employees in any way which would *deprive or tend to deprive* any individual of employment opportunities or otherwise *adversely affect his status as an employee,* because of such individual's * * * sex * * *." And that "(c) It shall be an unlawful employment practice for a labor organization—(1) * * * to discriminate against, any individual because of his * * * sex, * * *; (2) to * * * *classify* its membership, * * * in any way which would *deprive or tend to deprive* any individual of *employment opportunities* or would *limit such employment opportunities* or otherwise *adversely affect his status as an employee* * * * because of such individual's * * * sex * * *;"

Measured by these prohibitions the discriminatory effects flowing from a sex-based disparity in retirement ages between men and women are obvious and real. First, as has been seen, the plan itself constitutes a "term, condition, or privilege of employment" for all employees irrespective of whether its terms are discriminatory. Second, the benefits accrued or paid to employees—or promised to applicants upon hire—are a part of an employees' "compensation". Third, a forced retirement ordained under compulsory retirement age provisions is

1. We are surprised at the fact that the petitioner union is, in essence, undermining its own right to bargain collectively over retirement benefits. The union by joining with the petitioner company to ask this Court to review the legal foundation of *Inland Steel* is negating its own right to negotiate with the company over retirement plans as a part of the collective bargaining process.

tantamount to a "discharge". Fourth, the plan's sex-based retirement ages and sex-based benefit allocation constitute an employee "classification" which "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's * * * sex * * *".

Having seen that retirement plans are a "condition of employment" under which an employee labors "during all the days of his employment" a retirement plan establishing different retirement ages for men and women is, during its existence and by its very nature, a continuing condition of employment which "adversely affects his status as an employee because of such individual's * * * sex" proscribed by Section 703 (a) and (c) of the Act. 42 U. S. C. 2000e-2 (a) and (c).

Thus an employee who is subject to such a continuing discriminatory employment practice is a person aggrieved during the continuance of the discriminatory practice.

Indeed the Courts hold that Title VII protects the individual if injury is *threatened* to the class to which he belongs. In *Carr* v. *Conoco Plastics, Inc.*, 423 F. 2d 57 (5th Cir., 1970) the Fifth Circuit held that *applicants* for employment are persons aggrieved and have standing to attack "* * * employment practices committed by the same employer, if those practices, *although not directly injurious to them* at the time of their application, potentially affect them because of their race" (Emphasis supplied).

Discrimination on the basis of a class characteristic *i.e.*, race, sex, religion or national origin being the evil sought to be ended by the Civil Rights Act (*Bowe* v. *Colgate Palmolive*, 416 F. 2d 711 (7th Cir., 1969)), the rationale for granting to persons themselves not yet harmed the status of a "person aggrieved" is that "* * * the Damoclean threat of a * * * discriminatory policy hangs over the * * *

class." *Hall* v. *Werthan Bag Corporation*, 251 F. Supp. 184 (D. C. M. D. Tenn., 1966).

The courts, early on, recognized the clear distinction between a single, isolated completed act and a "continuing violation" and the significance of this distinction to the administrative and judicial procedures provided for by Title VII. See *Cox* v. *U. S. Gypsum Company*, 409 F. 2d 289 (7th Cir., 1969); *Charles King, et al.* v. *Georgia Power Company, et al.*, 295 F. Supp. 943 (D. C. N. D. Ga., 1968); *Culpepper* v. *Reynolds Metals Co.*, 296 F. Supp. 1232 (N. D. Ga. 1968), reversed on other grounds 421 F. 2d 888 (5th Cir., 1970).

Where, as in the present case, the discriminatory employment practice is a continuing practice and a continuing violation the courts have had no difficulty recognizing, and have uniformly held, that the ninety day period prescribed by Section 706 (d) [42 U. S. C. 2000e-5 (d)] of the Act for the filing of an administrative charge is of no practical importance or effect. *Cox* v. *U. S. Gypsum Company*, 409 F. 2d 289 (7th Cir., 1969).

Finally, it was too late for petitioners to object in the district court that the respondent's administrative charge was untimely filed with the Commission when they had adequate opportunity during the administrative process —lasting over two years—to raise that defense. Petitioners accepted service of the charge, permitted the Commission to investigate the allegations of that charge, and took part in conciliation efforts after they were in receipt of the Commission decision finding the retirement plan in violation of the Act. Clearly, petitioners could have resisted service of the charge, or they could have resisted the Commission's investigation by raising objections under the procedure provided in Section 710 of the Act, 42 U. S. C. Section 2000e-9 (d). By not objecting during the administrative process, petitioners made it highly unlikely, if not

impossible, for respondent to have done what they later claim should have been done—that respondent should have waited and filed the charge within ninety (90) days after her involuntary retirement. The Commission was investigating the respondent's charge, with the cooperation of the petitioners, during the time in which petitioners now contend that a new charge should have been filed by respondent alleging the identical conduct. In fact, respondent was involuntarily retired under the retirement plan only four days after the Commission served the charge upon petitioners.

That it is now too late for petitioners to object that respondent's administrative charge was prematurely filed has recently been judicially confirmed by the Fifth Circuit in *Boudreaux* v. *Baton Rouge Marine Co.*, ... F. 2d ....., 3 FEP Cases 99, February 1, 1971, where the District Court granted summary judgment against the plaintiff on the ground that the plaintiff had not met the "jurisdictional prerequisite" for suit of being personally affected by the alleged discrimination within ninety (90) days prior to the filing of charges with the EEOC. The Court of Appeals for the Fifth Circuit reversed holding that where the EEOC had once determined that a charge was timely, and that the charging party was a person aggrieved within the ninety (90) day period, and had actually entered into a conciliation attempt, it is not in keeping with the Congressional intent that the timeliness of the filing of the EEOC charge should be open to reconsideration by the Court, when, often years or many months afterward, a suit is filed because conciliation has failed.

Thus the respondent's statutory and adjudicated status as a person aggrieved with standing to challenge the maintenance of a sex-based discriminatory employment practice as a present discriminatory condition of employment is pure and the decision of the Court of Appeals so holding is clearly correct.

II.

THERE IS NO VARIANCE BETWEEN THE ADMINISTRATIVE CHARGE OF DISCRIMINATION ALLEGING MAINTENANCE OF A SEX-BASED DISCRIMINATORY RETIREMENT PLAN AND THE SUBSEQUENTLY FILED JUDICIAL COMPLAINT ALLEGING THE MAINTENANCE OF SUCH PLAN AND THAT A CONSEQUENCE OF ITS CONTINUED MAINTENANCE WAS THE PREDICTED MANDATORY RETIREMENT OF THE CHARGING PARTY.

The petitioners concede that in her administrative charge the respondent alleged that petitioners had committed and were committing an unlawful employment practice in violation of Title VII by maintaining a retirement plan which discriminated against her because of her sex (Petition page 6 footnote 1). She further said that if this plan were to continue to June 30, 1967, her card would be pulled and she would not be able to work any more.

In her judicial complaint, filed more than two years later and after EEOC investigation and failure of conciliation, respondent alleged petitioners' maintenance of an unlawful sex-based discriminatory retirement plan, that it did in fact continue, her card was in fact pulled and she was discharged pursuant to the plan.

The administrative charge said the illegal retirement plan if continued will cause my termination; the judicial charge said the illegal retirement plan did continue and did cause my termination.

It is simply absurd to say that the respondent in her judicial charge complains only of the effect which she predicted if by that it is meant that she has abandoned her prior claim of the illegality of the cause.

There is a perfectly obvious continuity running through the administrative charge to the judicial pleading.

Petitioners' position vis a vis the judicial complaint derives inter alia from a pervasive and persistent unwillingness to accept the remedial and humanitarian underpinnings of Title VII. Mindful of these, however, the courts have been extremely reluctant to allow procedural technicalities to bar claims brought under the Act. *Sanchez* v. *Standard Brands, Inc.*, 431 F. 2d 455 (5th Cir., 1970).

Sanchez brings to sharp focus the necessity for these judicial safeguards at page 460, footnote 1, and quotes the Seventh Circuit in *Choate* v. *Caterpillar Tractor*, 402 F. 2d 357 (7th Cir., 1968) 359 when that court recognizes the role of the private litigant in the context of Title VII cases. "His role assumes great significance because of the unusual nature of the EEOC. 'Unlike so many Governmental structures in administrative law, [the] EEOC is an administrative agency without the power of enforcement.' *Pettway v. American Cast Iron Pipe Co.*, 411 F. 2d 998 (5th Cir., 1969) 1005. * * * 'Enforcement of the rights of aggrieved parties resides exclusively in the Federal Courts. * * *' Thus it is obvious that the private litigant's right of access to the courts must be vigilantly protected, for if the courthouse door closes in his face, enforcement of the Act ceases to exist."

From the cases has emerged what may be considered a general rule based upon its inherent logic within the statutory scheme that the allegations of the judicial complaint may encompass any kind of discrimination like or related to allegations made in the administrative charge and growing out of such allegations during the pendency of the case before the Commission. "Any other result would be destructive of the beneficent ends of this legislation." *King* v. *Georgia Power Company*, 295 F. Supp. 943 (D. C. N. D. Ga. 1968) (p. 947).

The *Sanchez* court distills the essence of the combat and approves the colorful manner of characterizing the en-

counter between a Title VII complainant and a "huge industrial employer" as a "modern day David and Goliath confrontation" adding that "In such a confrontation, surely Goliath should not be allowed to fell David with the help of a club fashioned from forms and legal technicalities. The most elementary principles of justice require us to remove this club and compel a battle on the *merits* of the controversy" (p. 467).

But in any event, there is, in fact, no variance in this case. To give viability to the petitioners' contentions would require that the court ignore the most fundamental doctrines firmly established, universally understood, uniformly accepted and invariably applied governing construction and appellate review when confronted with a motion to dismiss an action under Rule 12(b).

This issue raised by the petitioners is merely peripheral to the present posture of this case. It does not in any sense broadly concern the practices sought to be eradicated by the Act. The decision of the Court of Appeals is clearly correct; there is no conflict of decision among the circuits; there is no important question of federal law.

III.

A RETIREMENT PLAN WHICH TREATS MEN AND WOMEN DIFFERENTLY IN RESPECT OF THEIR AGES OF RETIREMENT VIOLATES TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

The Civil Rights Act of 1964 prohibits sex-based discrimination in "conditions of employment".

A retirement plan is a "condition of employment".

A sex-based disparity in retirement ages of men and women violates the Act.

The Court of Appeals was thus clearly correct in holding that a sex-based retirement plan establishing different retirement ages for men and women violates Title VII.

As we have already seen, the principle underlying this holding is neither new nor novel. The decision simply requires the application to Title VII of the established principle of labor relations that a retirement plan is a "condition of employment".

To reach this conclusion merely involves a plain meaning construction of the language of the Act and, as the Court of Appeals said, the petitioners "have come forward with no reason why we should conclude that the language of Title VII does not mean what it says."

Although the present case is the only case at the appellate level on this point, its holding is no departure from established doctrine.

There is, however, one other decision directly on point and it has held, as did the Court of Appeals, that retirement plans containing differing treatment of men and women in respect of retirement ages violates Title VII. *Rosen et al. v. Public Service Electric Company,* ..... F. Supp. ..... (D. C. N. J. 1970) (2 FEP Cases 1090 (1970) (3 Employment Practices Decisions 6208) (affirmed on rehearing 3 E. P. D. 6216).

That court found that the retirement plan it considered "as it existed prior to the revision of May 1, 1967, violated Title VII by discriminating against male employees in favor of female employees on no other apparent basis than that of sex" 2 FEP Cases 1094).

The court then held that "after reviewing Title VII, its legislative history and the cases decided subsequent to its enactment, this court concurs with the judgment of the Equal Employment Opportunity Commission that differences in retirement plans, be the plan optional or compulsory, are violative of Title VII of the Civil Rights Act of 1964".

In the course of reaching this decision the *Rosen* court made an exhaustive study of the legislative history of the Act and of the commentaries on it and said in respect of that history and the statement of Senator Humphrey made in a letter written several years later, upon which petitioners rely: "The debates in Congress neither support nor refute Senator Humphrey's letter."[2] (p. 1096.)

There is no comfort for the petitioners in the legislative history of the Act. Neither is there refuge for them in their contention that the respondent is estopped to contest the legality of her retirement pursuant to a collective bargaining agreement negotiated by the petitioner Union because she was one of its members. It should suffice to say here, as *Rosen* v. *Public Service Electric Co.*, 2 FEP Cases 1090 *supra,* held that "private parties cannot agree to perform illegal acts" and that "relief may be granted to remedy present and continuing effects of past discrimination." *Griggs* v. *Duke Power Company*, 420 F. 2d 1225 (4th Cir., 1970) 1230.

Petitioners invitation to this Court to carve out an "equitable exception" should be recognized and labeled for what

2. "Some classification schemes which use sex as a factor by which to place employees in one class or the other do so pursuant to a statistically valid difference between the sexes. The type of classification presents a subtle problem with regard to the definition of explicit discrimination prohibited by Section 703(a).[37]

37. Congressional intent concerning the effect of Title VII on use of such statistical differences between the sexes was unclear. Senator Humphrey felt that differences of treatment of the sexes in industrial benefit plans, including early retirement options for women, were not illegal under Title VII because of the addition of Section 703(h) [42 U. S. C. Sec. 2000e-2(h)] to the Act. *110 Cong. Rec.* 13,663-64 (1964). The relevant part of Section 703(h) provides that differences in compensation paid to employees are not illegal if authorized by the Equal Pay Act of 1963, 29 U. S. C. Sec. 206(d) (1964). The effect of this amendment is that interpretations of the two statutes, which are administered by different agencies, will not contradict each other. Since the Equal Pay Act makes no provision whatsoever for a sex-based difference in retirement age or benefits, Senator Humphrey's interpretation is quite puzzling.' *84 Harvard Law Review* 1109, 1172-1173.

it is: an invitation to this court to repeal Title VII by judicial legislation, to grant petitioners a judicial license to thwart a stable principle of our national labor policy, to violate the law and "to freeze an entire generation of female employees into discriminatory patterns that existed before the Act" condemned by the Fourth Circuit in *Griggs* v. *Duke Power Company, supra,* quoting and relying upon *Quarles* v. *Phillip Morris, Inc.,* 279 F. Supp. 505, 516 (E. D. Va., 1968). Such an exception would not be "equitable". It would be illegal.

Again the Court of Appeals is clearly correct. There is no conflict of decision among the circuits; there is no important question of federal law not settled by this Court, nor has the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.

IV.

EEOC'S GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C. F. R. SECTION 1604.31 CANNOT BE SUCCESSFULLY INTERPOSED BY PETITIONERS AS AN AFFIRMATIVE DEFENSE TO LIABILITY UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

The petitioners' position is rendered no more tenable by virtue of the attack upon the Commission's *Guidelines on Discrimination Because of Sex,* 29 C. F. R., Sec. 1604.31(a). In the final analysis, the *Guideline* questioned is relevant here only insofar as it buttresses the contention of the respondent that the retirement plan in issue is outlawed by Title VII.

As should be clear from the foregoing discussion of the legislation, the Commission has made an eminently reasonable interpretation of the Act in this *Guideline* which states [29 C. F. R. 1604.31(a)]:

> "A difference in optional or compulsory retirement ages based on sex violates Title VII."

This published pronouncement is entitled to great weight in that it reflects the considered opinion of the agency charged with the day-to-day responsibility of obtaining compliance with the Act. *Cox* v. *United States Gypsum Co.*, 409 F. 2d 289, 291 (7th Cir., 1969); *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357, 360 (7th Cir., 1968); *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228, 235 (5th Cir., 1969). *Cf. Udall* v. *Tallman*, 380 U. S. 1, 16 (1965).

Contrary to the position of petitioners in the lower courts, the distinctions carved out in the retirement plan did not switch from legal to illegal upon the effective date [October 1, 1968] of the Commission's *Guideline* on that subject. The conduct which was challenged by respondent before the EEOC and before the courts below was made illegal by Congress on July 2, 1965, and not by the Commission at some later date. The *Guideline* in question performs only the function of providing those subject to the Act with advance warning that adherence to certain policies will constitute, in the opinion of the agency, a violation of the Act. This important function was noted by the Court in *American Newspaper Publishers Association* v. *Alexander*, 294 F. Supp. 1100, 1103 (D. D. C., 1969): "The promulgation of interpretive guidelines is a necessary function of an agency which is entrusted with the duty of administering a statute. In the case of a statute such as Title VII, where emphasis is placed on voluntary compliance with the requirements of non-discrimination, and where there is a general lack of guideline precedent, the promulgation of reasonable interpretive guidelines has the salutary effect of informing the public of the Commission's interpretation of the statute." Thus, a guideline is no more or no less than an announcement that the Commission will decide certain types of complaints under the aegis of a general rule.

The suggestion that such an administrative announcement is required as a prelude to accountability under the

statute is without merit. Recently, under Title II of the Civil Rights Act of 1964, the Court of Appeals for the Fifth Circuit in *Miller* v. *Amusement Enterprises*, 426 F. 2d 534 (5th Cir., 1970), rejected a similar contention. There, defendant argued that it takes a prior judicial announcement to activate a federal statute and that a first-impression offender is not subject to remedy. In rejecting this argument Chief Judge Brown aptly noted that:

> "* * * The reasoning would essentially transplant the effective date of any statute from the date fixed by the legislature to the date of the first authoritative judicial interpretation. It would also mean that the person whose post-effective date (as legislatively fixed) action is the first to be judicially declared in violation of the statute could not be held accountable. Nor, for that matter, could any others whose actions, which otherwise would be thought of as plain violations of the statute, had taken place between the effective date as fixed by the legislature and the first judicial pronouncement. Conversely the injured party would have few if any remedies even though expressly provided by the statute until some other plaintiff had preceded him in breaking the ground.
>
> "A fictionalized approach which grants effectual absolution to the first defendant (civil or criminal) and makes a sacrificial lamb of the first victim is hardly acceptable." 426 F. 2d at 536.

Obviously, since a judicial pronouncement is not required to activate a statute, an administrative announcement could not be required. Moreover, since a guideline does not affect the authority of a federal court to "interpret the statute differently" from the Commission as stated in a guideline [*American Newspaper Publishers Association* v. *Alexander, supra* at 1103] or in an administrative decision, petitioners' reliance on the non-existence of a guideline is clearly misplaced.

Any contention that the Commission in its guideline somehow destroyed the respondent's rights before a court

have been put to rest by the Seventh Circuit's recent decision in *Flowers* v. *Laborers International Union, Local 6,* ..... F. 2d ....., 2 FEP Cases 881 (7th Cir., 1970) at 883, where the Court, quoting from the Third Circuit opinion in *Fekete* v. *United States Steel Corp.*, 424 F. 2d 331, stated that (2 FEP Cases at 883):

> "We cannot accept the hypothesis that Congress intended to entrust the key to judicial relief with an agency given no power to direct the processing of the civil action in court.
>
> "Unquestionably, the Commission's role is an important one, designed to encourage and to effect a voluntary compliance with the provisions of the Act. But in the role of investigator and conciliator, the Commission is not the final arbiter of an individual's grievance. Under Title VII that function is vested solely in the Courts. No power to issue penalty, citation, or cease and desist orders have been vested in the Commission by Congress.
>
> "In sum, we do not conceive the role of the Commission to be that of exclusive administrator of the Act. Although it is entrusted with important and sensitive responsibilities of investigation and conciliation, it was not intended by Congress to preempt the ultimate rights of the claimant, the person the Act was designed to protect. We therefore conclude that the ultimate decision whether the claim is real or fanciful must be for the courts, and not the Commission.
>
> "We hold that the intention of Congress in Title VII was: First, to outlaw [discriminatory] employment practices * * *; second, to require that 'a person claiming to be aggrieved' must first resort to the Commission's processes; third, to insure that if the Commission finds reasonable cause, it will attempt to effect voluntary compliance by the employer; fourth, to provide that once the 'person claiming to be aggrieved' satisfies the statutory requirement of affording the Commission the opportunity to perform its statutory function, he has the right to a judicial determination whether he has been a victim of a violation. *Fekete*

v. *United States Steel Corp., supra* at 6677 (footnote omitted)."

Finally, we fail to perceive how the Commission guideline concerning retirement plans could have possibly affected the status of this case before the district court. The only effect which such a guideline can have is contained in Section 713(b) of Title VII [42 U. S. C. 2000e-12(b)] which states that:

> "In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice *if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission* * * *" (Emphasis supplied.)

In this case, the respondent filed her charge with the Commission approximately one year before the Commission, on February 24, 1968, issued the guideline in question. There was no guideline or other written interpretation in existence on which petitioners could plead and prove reliance under Section 713 [42 U. S. C. 2000e-12(b)]. The subsequently issued guideline could not possibly have affected their conduct and cannot now be interposed as a defense.

What the Petitioners persist in overlooking is the fact that Congress delayed the effective date of certain provisions of the Act, including the effective date of Section 703, from the date of its passage to one year thereafter, to-wit: July 2, 1965, in order to provide ample time within which to comply with its requirements.

That this Court should be importuned to grant certiorari on the basis of two telephone calls from two other large "nationally known employers" who likewise had one year

to come into compliance, but who apparently are still in open violation of the Act, is so incredibly preposterous as to be unworthy of notice and so we ignore it.

CONCLUSION.

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN W. MONTGOMERY,
MONTGOMERY & ZIMMERMAN,
708 Tower Building,
South Bend, Indiana 46601,
Attorney for the Respondent.

APPENDIX A.

1. Section 2000e-2(a) and (c) of Title 42 of the United States Code provides in material part that:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) * * * to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *; or
>
> (2) to * * * classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *.
>
> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to * * * classify its membership * * * in any way which would deprive or tend to deprive any individual of employment opportunites, or would limit such employment opportunities or otherwise affect his status as an employee * * * because of such individual's * * * sex * * *; or
>
> (2) to cause or attempt to cause an employer to discriminate against an individual in violation of this Section.

2. Section 2000e-5(a), (d) and (e) of Title 42 of the United States Code provides in material part:

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved * * * that an employer, * * * or labor organization has engaged in an

unlawful employment practice, the Commission shall furnish such employer, * * * or labor organization * * * with a copy of such charge and shall make an investigation of such charge, * * *. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion * * *.

(d) A charge under Sub-section (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred * * *.

(e) If * * * the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, * * *.

3. Section 2000e-9(d) of Title 42 of the United States Code provides in material part that:

(d) In any proceeding brought by the Commission under subsection (b) of this section, except as provided in subsection (c) of this section, the defendant may petition the court for an order modifying or setting aside the demand of the Commission.

4. Section 2000e-12(b) of Title 42 of the United States Code provides in material part:

(b) * * * no person shall be subject to any liability * * * on account of (1) the commission by such person of an unlawful employment practice if * * * the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the commission * * *.

APPENDIX B.

The Equal Employment Opportunity Commission's *Guidelines on Discrimination Because of Sex*, Section 1604.31(a), 29 C. F. R. Section 1604.31(a) provides in material part that:

> Pensions and Retirement Plans. (a) A difference in optional or compulsory retirement ages based on sex Violates Title VII.